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State Bar Associations and Attorney Online Speech: Punishment Without Proper Guidance

Mary Lamar W. Nicholas*

I. INTRODUCTION

Imagine you are an attorney who just spent the last half-hour of your commute home fuming about the latest unpleasant court appearance before a judge. This particular judge engaged in repeated exasperating behavior and has a reputation for making poor decisions from the bench. You believe the judge unnecessarily frustrates your attempts to secure justice for your client. You arrive home and type an impassioned letter delineating the misdeeds of the judge. Do you e-mail the letter to the opposing counsel to support some manner of alternative dispute resolution outside of the courtroom? Do you forward the letter to colleagues asking for advice? Or, alternatively, do you post it to Facebook hoping for some kind of social media social justice? To many attorneys' surprise, an affirmative answer to any of these questions could result in severe disciplinary actions for the online advocacy. The blurred distinction between private and public speech on the Internet might lead some lawyers to make comments that a court would find a *reasonable attorney* would not have made. Such comments often violate various rules promulgated by state bar associations that govern attorney conduct—particularly speech that criticizes the judiciary. Additionally, state bar associations punish conduct or speech they find prejudicial to the administration of justice. In an effort to balance the state's interest in providing fair and impartial trials, as well as a lawyer's right to free speech, various state bar associations adopted the American Bar Association's *Model Rules of Professional Conduct*. Unfortunately, application of the rules to specific disciplinary proceedings has resulted in a melee of lower court decisions applying various standards and punishments. Accordingly, attorneys face uncertainty as to how courts, bar associations, and other governing entities may view their speech in light of the different standards.

In the modern world, the offending attorney speech now appears on both the Internet and in print publications. Multiple state bar associations have sanctioned attorneys for speech made online that they found violated the professional conduct rules. These cases highlight the multiple platforms on which attorneys may "speak" on the Internet. More importantly, these cases also reveal unique aspects of Internet communication that make online speech more susceptible to widespread dissemination. Due to the unique nature of online speech, state bar associations have strongly indicated that of-

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fensive online speech made will not enjoy First Amendment protections. Although state bar associations have taken steps to educate attorneys about professional responsibility and the pitfalls of social media use, bar associations could further delineate the distinction between private and public online speech so that lawyers may engage in free speech while maintaining appropriate attorney conduct.

This comment will first examine First Amendment jurisprudence that provides insight into the permissible scope of these regulations. Next, this comment will examine five cases in which disciplinary committees sanctioned attorneys for speech made about the judiciary. Then, this comment will address four cases in which attorneys violated related disciplinary rules through their online speech. Finally, this comment will explore the tension between private and public online speech and how various bar associations can better educate attorneys on the matter. As will be discussed below, state bar associations should take more proactive steps to educate their attorneys about the potential ramifications of speaking on the Internet, and they should offer more resources for attorneys who wish to research potential disciplinary issues that might arise from such conduct.

II. HISTORICAL BACKGROUND

The ABA *Model Rules of Professional Conduct* (ABA *Model Rules*) indirectly address the issue of attorney speech regarding the judiciary in Rules 8.2(a) and 8.4(d).¹ Rule 8.2(a) states, in relevant part, “[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.”² In 1964, the Supreme Court set out an *actual malice* standard regarding libelous speech in *New York Times Co. v. Sullivan*, and Rule 8.2(a) tracks that language.³ Instead of courts holding attorneys to the *Sullivan* subjective knowledge test, however, they often hold attorneys to a more undefined *reasonable attorney* standard—a discrepancy with important ramifications for attorney discipline.

Rule 8.4(d) states in relevant part, “[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.”⁴ The rule does not define what conduct may be “prejudicial to the administration of justice,” so a myriad of conduct may violate the rule, including attorney speech.⁵ Most states adopted similar rules with analogous

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1. See MODEL RULES OF PROF'L CONDUCT r. 8.2(a), r. 8.4(d) (AM. BAR ASS'N 2013).
 2. *Id.* r. 8.2(a).
 3. Compare *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964), with MODEL RULES OF PROF'L CONDUCT r. 8.2(a).
 4. MODEL RULES OF PROF'L CONDUCT r. 8.4(d).
 5. See *In re McCool*, 172 So. 3d 1058 (La. 2015). Although this case involves violation of the Louisiana Rules of Professional Conduct, the language of the

language to the ABA *Model Rules*.⁶ Consequently, state bar associations commonly regulate attorney speech critical of the judiciary under the guise of conduct that the association deems prejudicial to the administration of justice.

A. *In re Sawyer*

In an early case involving attorney speech, the U.S. Supreme Court did not address the constitutional implications of rules governing attorney speech. Six weeks after the trial began, in which attorney Harriet Sawyer served as defense counsel, Sawyer made comments that allegedly *impugned* the judicial integrity of presiding Judge Jon Wiig.⁷ The speech referred to “‘horrible and shocking’ things at the trial; the impossibility of a fair trial; the necessity, if the Government’s case were to be proved, of scrapping the rules of evidence; and the creation of new crimes unless the trial were stopped at once.”⁸ The Ethics Committee found that Sawyer’s speech violated Canon 1 of the *Canons of Professional Ethics* by accusing Judge Wiig of unfairness in the trial at hand.⁹

The Supreme Court limited its review of the case to the question of whether the facts supported the Committee’s findings that Sawyer’s speech *impugned* Judge Wiig’s impartiality and fairness in conducting the trial.¹⁰ The Court acknowledged that dissenting legal opinions differ from the speech at hand by stating, “[d]issenting opinions in our reports are apt to make [Sawyer’s] speech look like tame stuff indeed.”¹¹ The Court then emphasized that lawyers should not make *impugning* comments during a pending case.¹² The Court here quelled any question as to whether a lawyer’s speech may be more censurable in pending litigation or more censurable because the lawyer is involved in a case.

violated rule is identical to that of MODEL RULES OF PROF’L CONDUCT r. 8.2(a). The Louisiana Supreme Court disbarred attorney Joyce Nanine McCool for comments she made on the Internet that the court deemed “prejudicial to the administration of justice.” *See id.* at 1078. This comment will address *McCool* in depth.

6. *See Chronological List of States Adopting Model Rules*, AM. B. ASS’N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/chrono_list_state_adopting_model_rules.html (last visited Aug. 30, 2016).

7. *In re Sawyer*, 360 U.S. 622, 623–25 (1959).

8. *Id.* at 630.

9. *Id.* at 625.

10. *Id.* at 626.

11. *Id.* at 635.

12. *Id.*

Ultimately, the Court found that Sawyer's comments did not cross the line of impugning Judge Wiig, primarily because the speech did not mention the judge personally.¹³ As a result, the Court struck down the suspension order without deciding the constitutionality of a rule that mandated respectful behavior and speech.¹⁴ Although the Court did not rule on the constitutionality of Canon 1 of the *Canons of Professional Ethics*, the Court made clear that lawyers may be held responsible for speech made in both pending and non-pending litigation regardless of whether they are personally involved.

B. *In re Snyder*

The U.S. Supreme Court subsequently declined to rule on the constitutionality of another rule that regulated attorney speech criticizing the judiciary because the content of the speech in question did not necessitate suspension from the practice of law.¹⁵ Federal Rule of Appellate Procedure 46 states that an attorney may be disciplined if "found guilty of 'conduct unbecoming a member of the bar of the court.'"¹⁶ The secretary of a district judge in the U.S. District Court of the District of North Dakota received a "harsh" letter from attorney Robert Snyder concerning unapproved expenditures for his service representing a defendant under the Criminal Justice Act.¹⁷ The Chief Judge of the U.S. Court of Appeals for the Eighth Circuit threatened to issue an order directing Sawyer to show why he should not be suspended from practice in the Circuit unless Sawyer apologized for the letter.¹⁸ After Sawyer refused to apologize, the judge issued the threatened order, and the Eighth Circuit suspended Sawyer from the practice of law in the Eighth Circuit for six months because Sawyer's "disrespectful" speech rendered him unfit to practice law in the federal courts.¹⁹ However, the U.S. Supreme Court found that Sawyer's speech as a single instance of potential misbehavior did not indicate that Sawyer was unfit to be a member of the bar, and the Court noted that the letter in question was addressed to an administrative employee, not a specific judge.²⁰

The Court provided insight into the phrase "conduct unbecoming a member of the bar of the court" by determining that the phrase should be interpreted in light of the "complex code of behavior to which attorneys are

13. *In re Sawyer*, 360 U.S. at 634.

14. *Id.* at 636.

15. *See In re Snyder*, 472 U.S. 634, 642-43, 647 (1985).

16. *Id.* at 635.

17. *Id.* at 634.

18. *Id.* at 638.

19. *Id.* at 634-35.

20. *Id.* at 646-47.

subject.”²¹ Additionally, the Court determined that the phrase means “conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice.”²² Finally, the Court found, “‘the lore of the profession’” provided guidance in determining if an act constitutes “conduct unbecoming a member of the bar.”²³ The Court clearly indicated a preference for maintaining a requirement of respectful speech in light of the traditions of the legal profession even though it did not rule on the constitutionality of Federal Rule of Appellate Procedure 46.

C. *Gentile v. State Bar of Nevada*

The U.S. Supreme Court took a more in depth look at attorney speech in *Gentile v. State Bar of Nevada*, which involved a state rule of professional conduct. In 1991, the Court found that a Nevada rule governing attorney speech violated the First Amendment rights of attorney Dominic Gentile.²⁴ The State Bar of Nevada sanctioned Gentile for comments he made at a press conference about a pending case.²⁵ A jury acquitted Gentile’s client of criminal charges six months after he held a press conference about the original indictment.²⁶ At the press conference, Gentile criticized the “character, credibility, reputation, [and] criminal record of the police detective and other potential witnesses” the prosecutor presented.²⁷ The State Bar of Nevada filed a complaint against Gentile for making the statements because the comments allegedly violated Nevada Supreme Court Rule 177.²⁸ The rule in question prohibited attorneys from making extrajudicial statements that he or she should know would “have a substantial likelihood of materially prejudicing a judicial proceeding.”²⁹

The Court gave credence to the importance of protecting political speech critical of government officials—in this case, speech about the elected prosecutor. Specifically, the Court recognized “[t]he judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations.”³⁰ However,

21. *In re Snyder*, 472 U.S. at 635.

22. *Id.*

23. *Id.* at 645.

24. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1033 (1991).

25. *Id.* at 1030.

26. *Id.*

27. *Gentile v. State Bar of Nev.*, 787 P.2d 386, 387 (1990), *rev’d*, 501 U.S. 1030 (1991).

28. *Gentile*, 501 U.S. at 1033.

29. *Id.*

30. *Id.* at 1035.

the Court confined its holding narrowly, only determining the constitutionality of the Nevada rule.³¹

1. Constitutional Analysis of Nevada Rule 177

The Court first engaged in a constitutional analysis of Nevada's interpretation and application of Rule 177. The Court noted, "a court [makes] its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil . . . against the need for free and unfettered expression."³² Therefore, courts must balance the state's interest in regulating lawyers and a lawyer's First Amendment rights regarding the speech in question when issuing decisions regarding lawyer conduct. The Court ultimately concluded that the formulation of the Nevada rule did not fail First Amendment review because the rule properly balanced the State's interest in providing fair trials with a lawyer's interest in freedom of speech.³³

2. Dicta About Attorney Disciplinary Rules

The opinion provided important insight into the issue of regulating attorney speech. It declared, "the American judicial trial remains one of the purest, most rational forums for the lawful determination of disputes."³⁴ The Court noted that lawyers should not frustrate the judicial system by making allegations about the judiciary to the press.³⁵ It conceded, however, that it might be necessary to make comments to the press in order to prevent "abuse of the courts."³⁶

Finally, the Court found that, although *Gentile* did not provide the relevant opportunity to define the outer limits of acceptable regulation of attorney speech regarding a pending adjudication,³⁷ rules governing the legal profession cannot regulate beyond that which the First Amendment protects.³⁸ The Court opined, "First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law."³⁹ The Court reiterated that the First Amendment protects lawyers' speech even if a regulating body considers otherwise.⁴⁰

31. *Id.* at 1036.

32. *Id.*

33. *Id.* at 1037.

34. *Gentile*, 501 U.S. at 1058.

35. *Id.*

36. *Id.*

37. *Id.* at 1057.

38. *Id.* at 1054.

39. *Id.*

40. *Gentile*, 501 U.S. at 1054.

D. First Amendment Background on Libel: The States are at Odds

ABA *Model Rule* 8.2(a) states in relevant part, “[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.”⁴¹ This language aligns directly with the language from *Sullivan*, in which the Supreme Court held that a public official could only recover “damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice.’”⁴² The statement must be made with “knowledge that [the statement] was false or with reckless disregard of whether the statement was false or not.”⁴³ Although the ABA *Model Rules* language parallels *Sullivan*, courts often apply a *reasonable attorney* standard instead of the Sullivan subjective malice standard when determining whether to sanction attorney speech.⁴⁴ Comments to the ABA *Model Rules* do not shed light on why the language tracks *Sullivan*.

1. The Florida Bar v. Ray

The Florida Supreme Court, which declined to duplicate the speech in question issued by attorney Michael Ray, held that the First Amendment did not protect the speech because Ray did not have an “objectively reasonable basis in fact for making the statements.”⁴⁵ The speech in question allegedly violated Florida Rule of Professional Conduct 4-8.2(a), which states, “[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.”⁴⁶ The court contended that Ray’s comments allegedly questioned the “veracity and integrity” and the fairness of the judge before whom Ray had appeared.⁴⁷ After the Florida Bar filed a complaint of minor misconduct against Ray,⁴⁸ a referee appointed to hear the case found that Ray violated the relevant rule.⁴⁹

The Florida Supreme Court first analyzed Ray’s speech against the backdrop of his duties as a lawyer, and it conceded that the ethical rules, which prohibit critical speech that impugns the judiciary, are not intended to

41. MODEL RULES OF PROF’L CONDUCT r. 8.2(a) (AM. BAR ASS’N 2013).

42. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

43. *Id.* at 280.

44. *See, e.g.*, *Fla. Bar v. Ray*, 797 So. 2d 556, 559 (Fla. 2001); *In re Simon*, 913 So. 2d 816, 824 (La. 2005); *Office of Disciplinary Counsel v. Gardner*, 793 N.E.2d 425, 431 (Ohio 2003).

45. *Ray*, 797 So. 2d at 558.

46. *Id.* at 557.

47. *Id.*

48. *Id.*

49. *Id.* at 557–58.

shield judges from criticism.⁵⁰ The court added an additional consideration that the rules exist to “preserve public confidence in the fairness and impartiality” of the judicial system.⁵¹ Nevertheless, the court noted that the state has a compelling interest in applying a different standard than the standard applied in defamation cases.⁵² The court specifically asserted that the standard should be “whether the attorney had an objectively reasonable factual basis for making the statements.”⁵³

Notably, Ray argued that the appropriate standard to apply is the subjective *Sullivan* standard.⁵⁴ Although the court conceded that the language in *Sullivan* and the relevant Florida disciplinary rule are similar, it outright rejected the subjective standard because defamation law and attorney disciplinary rules serve significantly different interests.⁵⁵ The court ultimately sided with the referee, who heard the relevant evidence, and found that Ray’s statements were false and made with reckless disregard as to their truth or falsity.⁵⁶ Finally, the court highlighted the importance of maintaining public confidence in the judiciary, and it emphasized that Ray’s speech might “erode public confidence in the judicial system.”⁵⁷ However, the speech in this case occurred privately in a letter to the judge.⁵⁸ The court then publicly reprimanded Ray for the speech contained in the letters,⁵⁹ and the U.S. Supreme Court denied Ray’s petition for a writ of certiorari.⁶⁰

This case shows the willingness of courts and disciplinary committees to extend their punitive powers into private speech. On the one hand, Ray’s speech that allegedly *impugned* the judge reached the judge’s eyes and ears directly because Ray sent the derisive letter to the judge himself.⁶¹ On the other hand, the disciplinary committee and court seemed concerned with protecting the public perception of the judiciary.⁶² Because the court chose to use the *reasonable attorney* standard, the court then had to compare Ray to the fictitious and undefined *reasonable attorney* as opposed to performing an analysis of his speech under the more flexible *Sullivan* standard. It seems

50. *Id.* at 558.

51. *Ray*, 797 So. 2d at 558–59.

52. *Id.* at 559.

53. *Id.*

54. *See id.* at 558.

55. *Id.*

56. *Id.* at 557.

57. *Ray*, 797 So. 2d at 560.

58. *Id.* at 557.

59. *Id.* at 558.

60. *Ray v. Fla. Bar*, 535 U.S. 930 (2002).

61. *Ray*, 797 So. 2d at 557.

62. *Id.* at 560.

obvious that the court would consider that a *reasonable attorney* would abide by the Florida Rules of Professional Conduct and not *impugn* a judge directly to the judge. Ray, therefore, received a public reprimand for his private speech.

2. *Office of Disciplinary Counsel v. Gardner*

The Ohio Supreme Court also applied the objective *reasonable attorney* standard to determine whether a lawyer knowingly made false accusations against a judge instead of the subjective *Sullivan* standard.⁶³ Mark Gardner allegedly violated several provisions of the Ohio Code of Professional Responsibility, including two that prohibited lawyers from engaging in undignified or discourteous conduct towards a tribunal and knowingly making a false accusation about a judge.⁶⁴ The Ohio Disciplinary Counsel filed a complaint against him for statements made in a motion to the U.S. Court of Appeals for the Eighth Circuit.⁶⁵

While the Ohio Supreme Court acknowledged that at least three states have used the *actual malice* subjective standard from *Sullivan* to address attorney speech that accuses members of the judiciary of some sort of misconduct,⁶⁶ the court agreed with the “majority of courts that have addressed this issue,” and it adopted an objective standard.⁶⁷ The court held that an attorney could face punishment for making comments about the judiciary that a *reasonable attorney* would not believe to be true.⁶⁸ The court defined the *reasonable attorney* standard as one that “assesses an attorney’s statements in terms of what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances [and] focuses on whether the attorney had a reasonable factual basis for making the statements.”⁶⁹ The court determined that Gardner simply assumed the judges were biased and corrupt, and so his comments were subject to sanction under the *reasonable attorney* standard.⁷⁰ In the court’s view, a *reasonable attorney* would not assume judicial bias and corruption without an inquiry into the matter.⁷¹ The court suspended Gardner from practicing law in Ohio for six

63. See *Disciplinary Counsel v. Gardner*, 793 N.E.2d 425, 431 (Ohio 2003).

64. *Id.* at 426.

65. *Id.*

66. *Id.* at 431 (citing *In re Green*, 11 P.3d 1078, 1085 (Colo. 2000); *Okla. Bar Ass’n v. Porter*, 766 P.2d 958 (Okla. 1988); *Ramsey v. Bd. of Prof’l Responsibility*, 771 S.W.2d 116 (Tenn. 1989), *cert. denied*, 493 U.S. 917 (1989)).

67. *Gardner*, 793 N.E.2d at 431.

68. *Id.* at 432.

69. *Id.* at 431 (internal quotations omitted).

70. *Id.* at 432–33.

71. *Id.* at 432.

months for violating the Ohio Code of Professional Responsibility,⁷² and the U.S. Supreme Court denied Gardner's petition for a writ of certiorari.⁷³

This case involved relatively private speech made about judges because the speech at issue occurred in a motion to the court.⁷⁴ Much like the letter to the judge in the case of attorney Michael Ray in Florida, this speech also only ever reached the eyes and ears of judges and not the public.⁷⁵ Nevertheless, the disciplinary committee and the reviewing court felt it incumbent upon themselves to discipline Gardner for the speech because it allegedly *impugned* the judges to whom the motion was directed.⁷⁶ This court also applied the *reasonable attorney* standard because it acknowledged that a majority of the courts apply that standard to attorney disciplinary cases.⁷⁷ At the very least, however, the reviewing court defined the parameters of a *reasonable attorney* and used that definition to decide that Gardner did not act in accordance with the proscribed considerations. This conceivably put other Ohio lawyers on notice that courts would apply a *reasonable attorney* standard to attorney disciplinary cases, which allows attorneys to proceed with their speech knowing that certain bounds exist to what a *reasonable attorney* might say in a similar situation.

3. *In re Simon*

The Louisiana Office of Disciplinary Council filed three counts of formal charges against attorney Clemille Simon because he filed various motions to recuse several judges from cases in which he was scheduled to litigate.⁷⁸ Simon wrote that that one judge "embark[ed] upon a campaign of misrepresenting the truth" and that another judge "violated not only controlling legal authority but the very principals [sic] (honesty and fundamental fairness) upon which our judicial system is based."⁷⁹ The Louisiana Supreme Court held that he violated Rule 8.2(a) of the Louisiana Rules of Professional Conduct.⁸⁰

The court determined that it would adopt an objective standard rather than a subjective standard to the case at bar.⁸¹ Specifically, the court held that an attorney violates Rule 8.2(a) when he makes accusations that, with the

72. *Id.* at 433.

73. *Gardner v. Office of Disciplinary Counsel*, 540 U.S. 1220 (2004).

74. *Gardner*, 793 N.E.2d at 431.

75. *See id.*; *see also* Fla. Bar v. Ray, 797 So. 2d 556, 557 (Fla. 2001).

76. *Gardner*, 793 N.E.2d at 432.

77. *Id.* at 431.

78. *In re Simon*, 913 So. 2d 816, 819–21 (La. 2005).

79. *Id.*

80. *Id.* at 825; *see also* La. St. B. art. 16 r. 8.2(a) (2016).

81. *Simon*, 913 So. 2d at 824.

exercise of ordinary care, he should have known to be false.⁸² Additionally, an attorney's subjective belief in the truth of the speech did not excuse a violation of Rule 8.2(a).⁸³ The court concluded that Simon made the statements with full knowledge of their falsity and that a *reasonable person* would not have believed Simon's criticism of the judiciary was warranted.⁸⁴ The court then suspended Simon from practicing law in Louisiana for six months,⁸⁵ and the U.S. Supreme Court denied Simon's petition for a writ of certiorari in 2006.⁸⁶

This case, remarkably, also involved relatively private speech made in various motions to judges. Again, both the disciplinary committee and the reviewing court found it necessary to review this conduct under an objective standard and to ultimately sanction the speech. The Louisiana Supreme Court, however, applied a *reasonable person* standard as opposed to a *reasonable attorney* standard, although the difference between the two standards did not materialize in this case. Ultimately, Simon failed the *reasonable person* standard and, therefore, endured a six-month suspension from the practice of law in Louisiana.

4. *Standing Comm. on Discipline v. Yagman*

The U.S. Court of Appeals for the Ninth Circuit adopted a version of the *Sullivan* standard in an attorney discipline case.⁸⁷ Lawyer Stephen Yagman made comments to the *Los Angeles Daily Journal* about Judge Keller, a judge before whom Yagman was to appear during litigation, stating that Judge Keller "has a penchant for sanctioning Jewish lawyers."⁸⁸ Yagman also gave negative comments to Prentice Hall about Judge Keller, which were to be published in the *Almanac of the Federal Judiciary*.⁸⁹ In addition, Yagman placed an advertisement in the *Los Angeles Daily Journal* requesting that lawyers contact him if Judge Keller had sanctioned them.⁹⁰ After the Standing Committee on Discipline of the U.S. District Court of California instituted disciplinary proceedings against Yagman, the court held that

82. *Id.*

83. *Id.*

84. *Id.* at 826.

85. *Id.*

86. *Simon*, 547 U.S. 1128 (2006).

87. *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995).

88. *Id.* at 1434 (quoting Susan Seager, *Judge Sanctions Yagman, Refers Case to State Bar*, L.A. DAILY J., June 6, 1991, at 1).

89. *Id.* at 1434.

90. *Id.*

Yagman had committed misconduct worthy of sanctions and suspended him from practicing law in the Central District for two years.⁹¹

On appeal, the Ninth Circuit first determined whether Yagman's speech violated Local Rule 2.5.2, which prohibited attorneys from engaging in conduct that impugns the integrity of the judiciary, as well as conduct that "interferes with the administration of justice."⁹² The court determined that Yagman's speech allegedly impugning the integrity of the judge was only punishable if the speech was capable of being proved false.⁹³ The court concluded that Yagman's speech lacked proof of falsity and thus could not be sanctioned.⁹⁴

This case marks a dramatic shift from the above cases because it adopted the *Sullivan* standard in an attorney disciplinary hearing, as opposed to the *reasonable attorney* standard that most of the courts have applied. The court focused on whether Yagman's speech could be proven true or false instead of what a *reasonable attorney* would believe or say about a judge. This arguably allowed for a more objective investigation into the speech because it did not rest on untested and undefined parameters of a *reasonable attorney*. Instead, the analysis simply focused on the truth or falsity of the speech and assessed the sanction accordingly. Because the court concluded that Yagman's speech lacked proof of falsity, it reversed the sanctions levied against him by the lower court.⁹⁵ This holding presents important implications for attorney disciplinary matters because it shows that interpreting attorneys' speech under the *Sullivan* standard allows courts to focus on the speech itself and not the fictitious specter of a *reasonable attorney*. If courts, to which the attorney directs the speech in these circumstances, possess the power to decide what a *reasonable attorney* would say about the judiciary, then lawyers must bend to the will of the judiciary and act accordingly. If courts scrutinize the speech itself, however, then lawyers stand accountable only for the truth or falsity of the speech instead of the indeterminate status of a *reasonable attorney*.

91. *Id.* at 1435.

92. *Id.* at 1436 (quoting Cent. Dist. of Cal. Local r. 2.5.2).

93. *Yagman*, 55 F.3d at 1438.

94. *Id.* at 1440–42 ("Yagman disclosed the basis for his view that Judge Keller is anti-Semitic and has a penchant for sanctioning Jewish lawyers: that he, Kenner and Manes are all Jewish and had been sanctioned by Judge Keller. The statement did not imply the existence of additional, undisclosed facts; it was carefully phrased in terms of an inference drawn from the facts specified rather than a bald accusation of bias against Jews.").

95. *See id.* at 1441–42, 1445.

5. *In re Green*

The Colorado Grievance Committee suspended attorney Lawrence Green for sixty days for making critical remarks about a judge.⁹⁶ In its opinion, the Colorado Supreme Court referenced the U.S. Supreme Court's application of the *Sullivan* actual malice test to a criminal defamation case involving the prosecution of a lawyer for criticizing a judge.⁹⁷ The court also acknowledged that several courts applied the same test, or a modification of it, to cases regarding attorney discipline for making comments critical of the judiciary.⁹⁸ The court agreed with the jurisdictions that applied the *Sullivan* standard to attorney disciplinary cases and held that it too would apply the *Sullivan* test.⁹⁹ The court established the following two-part test to determine whether attorneys may be sanctioned for speech critical of the judiciary:

- (1) whether the disciplinary authority has proven that the statement was a false statement of fact (or a statement of opinion that necessarily implies an undisclosed false assertion of fact); and (2) assuming the statement is false, whether the attorney uttered the statement with actual malice—that is, with knowledge that it was false or with reckless disregard as to its truth.¹⁰⁰

Ultimately, the court held Green's speech was "statements of opinion based upon fully disclosed and uncontested facts," and therefore it could not be sanctioned.¹⁰¹

This case also serves as an example of a court departing from the *reasonable attorney* standard and instead applying the *Sullivan* standard. While it is unclear why the court thought the *Sullivan* standard was more appropriate than the *reasonable attorney* standard for this particular attorney discipline case, the court does appear to have been influenced by the context of the *Sullivan* case. The court noted that although *Sullivan* involved criminal defamation, the Supreme Court applied the *Sullivan* test to a criminal defamation case involving a lawyer criticizing a judge.¹⁰² The court also noted that the Supreme Court "considers attorney discipline a 'quasi-criminal'

96. *In re Green*, 11 P.3d 1078, 1080 (Colo. 2000).

97. *Id.* at 1084; *see also* *Garrison v. Louisiana*, 379 U.S. 64, 76 (1964).

98. *Green*, 11 P.3d at 1084 (referencing *Yagman*, 55 F.3d at 1437–38); U.S. Dist. Court for E. Dist. of Wash. v. *Sandlin*, 12 F.3d 861, 867 (9th Cir. 1993); *In re* Petition for Disciplinary Action Against *Graham*, 453 N.W.2d 313, 320–21 (Minn. 1990); *State Bar v. Semaan*, 508 S.W.2d 429, 432–33 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

99. *Green*, 11 P.3d at 1085.

100. *Id.*

101. *Id.* at 1086.

102. *Id.* at 1084.

sanction.”¹⁰³ Therefore, the court decided sufficient reason existed to apply the *Sullivan* standard to the case at hand. This court’s approach and interpretation offers a viable alternative to courts that still must decide which standard to apply to attorney disciplinary cases.

6. Implications of the Reasonable Attorney Standard and the *Sullivan* Standard

The distinction between the rigid, ambiguous *reasonable attorney* standard and the less severe *Sullivan* standard is important because a correlation exists between the standard used and the length and severity of the punishment given. For example, the courts in the first three cases above used the *reasonable attorney* standard to assess the speech at issue, and all three cases resulted in harsher punishments as compared to the latter two cases that used the *Sullivan* standard.¹⁰⁴ Under the *reasonable attorney* standard, Michael Ray received a public reprimand; Mark Gardner was suspended from practicing law for six months; and Clemille Simon was suspended from practicing law for six months.¹⁰⁵ In comparison, under the *Sullivan* standard, Stephen Yagman received a reversal of his original two-year suspension, and Lawrence Green received a public reprimand and a fine in return for a reversal of his original sixty-day suspension.¹⁰⁶ A public reprimand and six-month suspensions stand in stark contrast to the outright reversals of suspension from practicing law. Therefore, attorneys likely want courts to apply the more flexible *Sullivan* standard as opposed to the rigid *reasonable attorney* standard when judging attorney discipline cases.

It is not clear why the *reasonable attorney* standard generally results in harsher sanctions as opposed to the sanctions that come out of the *Sullivan* standard. One reason may be that the *reasonable attorney* standard affords courts the leeway to punish attorneys who say things that the judiciary deems untoward conduct directed at the tribunal. After all, if the ABA *Model Rules* do not allow attorneys to *impugn* judges, then judges likely want to enforce the *Model Rules* so as to maintain their reputations. The untested parameters of what a *reasonable attorney* would do allows for judges and disciplinary committees to assert that a *reasonable attorney* would not *impugn* the judiciary because the ABA *Model Rules* do not allow for that conduct. However, that results in a closed-loop situation in which a *reasonable attorney* would not *impugn* the judiciary, while an *unreasonable attorney* might find im-

103. *Id.* (citing *In re Ruffalo*, 390 U.S. 544 (1968)).

104. *See, e.g.*, *Fla. Bar v. Ray*, 797 So. 2d 556, 559 (Fla. 2001); *Disciplinary Counsel v. Gardner*, 793 N.E.2d 425, 431 (Ohio 2003); *In re Simon*, 913 So. 2d 816, 824 (La. 2005); *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1437 (9th Cir. 1995); *Green*, 11 P.3d at 1085.

105. *See Ray*, 797 So. 2d at 560; *Gardner*, 793 N.E.2d at 433; *Simon*, 913 So. 2d at 827.

106. *See Yagman*, 55 F.3d at 1434, 1445; *Green*, 11 P.3d at 1080.

pugning the judiciary necessary in order to draw attention to potential misbehavior.

In light of attorneys making statements on the Internet, the distinction between the *reasonable attorney* standard and the *Sullivan* standard is significant because attorneys need to be aware that their online speech may result in harsh retribution by disciplinary committees and judges. Would a *reasonable attorney* make online comments about knowledge of a corrupt judge? What if that attorney had first-hand knowledge of the judge's corruption? And what if there was no viable alternative other than alerting the public about the corruption? Attorneys deserve to have courts either lay out the *reasonable attorney* standard more explicitly and define its parameters, or apply the *Sullivan* standard to attorney disciplinary cases so as to allow for more flexible analyses of specific circumstances.

III. CURRENT STATE OF THE LAW

Attorneys, practitioners of a speaking profession, naturally turn to any available outlets to speak. From newspaper columns, magazine articles, and books, attorneys often use their words to promote ideas and effect change. With the rise of the Internet, attorneys logically use it as a medium to express their thoughts and opinions. However, this tendency to share information over the Internet can result in over-sharing. Attorneys, therefore, need to be extremely cognizant of their duties as members of a regulated profession because their online speech may come under close scrutiny. Nevertheless, attorneys want to engage in sharing information over the Internet with as much freedom as possible. Thus, a tension exists between the human desire to speak on the Internet and the responsibility of attorneys to stay within the bounds of the *ABA Model Rules*. The following cases illustrate the ways in which attorneys' online speech may violate the *ABA Model Rules* and demonstrate the need for attorneys to be both informed and aware about the consequences that might stem from their Internet speech.

A. *In re McCool*

Louisiana attorney Joyce Nanine McCool ran afoul of the Louisiana Rules of Professional Conduct when she posted online statements about cases pending in both Louisiana and Mississippi.¹⁰⁷ A Mississippi judge first filed a complaint against McCool with the Louisiana Disciplinary Board of the Office of the Disciplinary Counsel (ODC), and the ODC then filed official charges against McCool.¹⁰⁸

Originally, McCool filed a petition in Louisiana for adoption proceedings on behalf of Raven Skye Boyd Maurer's new husband, who sought to

107. *In re McCool*, 172 So. 3d 1058, 1061 (La. 2015).

108. *Id.* at 1065.

adopt Maurer's two children.¹⁰⁹ McCool also filed a motion for emergency custody on Maurer's behalf because Maurer alleged that her former husband sexually abused their two young daughters.¹¹⁰ After presiding Judge Dawn Amacker stayed the adoption proceedings, pending the resolution of the Mississippi parental rights case involving Maurer and her former husband, McCool filed a writ application with the U.S. First Circuit Court of Appeal as well as writs with the Louisiana Supreme Court.¹¹¹ Both courts denied the writs.¹¹²

McCool and Maurer then posted a petition titled, "Justice for [H] and [Z]," on the website www.change.org, asking Judge Gambrell to, among other things, renounce jurisdiction in the child custody case to the Louisiana court and to alter various aspects of the guardian ad litem arrangement.¹¹³ McCool and Maurer also requested that Judge Amacker withdraw the stay of the adoption proceedings and set a hearing to allow Maurer's new husband to testify regarding why it would be in the girls' best interest that they be adopted by him.¹¹⁴ McCool took other actions to spread the petition on the Internet by re-posting it on her personal weblog, in online articles she authored, and on her personal Twitter account.¹¹⁵ In those mediums, McCool added contact information for the judges' offices and the Louisiana Supreme Court. Additionally, she added comments encouraging others to communicate their opinions about the pending cases to the relevant judges and the Louisiana Supreme Court.¹¹⁶

Someone, although it is unknown whom, faxed a copy of the online petition and the comments to Judge Amacker's office in Louisiana.¹¹⁷ The Louisiana Supreme Court's opinion indicates that either Maurer or Maurer's mother faxed the petition to Judge Amacker's office.¹¹⁸ Judge Amacker instructed her assistant to return the petition to McCool and cautioned Maurer against *ex parte* communications with a judge.¹¹⁹ McCool, however, continued discussing the cases online.¹²⁰ For disciplinary purposes, the Louisiana Supreme Court contended that McCool's additional comments, posts, and

109. *Id.* at 1060–61.

110. *Id.* at 1061.

111. *Id.*

112. *Id.*

113. *In re McCool*, 172 So. 3d at 1061.

114. *Id.*

115. *Id.* at 1061, 1063.

116. *Id.* at 1062.

117. *Id.*

118. *Id.*

119. *In re McCool*, 172 So. 3d at 1062.

120. *Id.*

tweets contained “false, misleading, and inflammatory statements about the manner in which Judge Gambrell and Judge Amacker were handling the pending cases.”¹²¹

Following a hearing, the ODC Hearing Committee found that McCool violated Rules 3.5(a), 3.5(b), 8.4(a), 8.4(c), and 8.4(d) of the Louisiana Rules of Professional Conduct.¹²² Specifically, the Committee found McCool “violated a duty owed to the public and the legal system” because she “acted knowingly, if not intentionally.”¹²³ The Disciplinary Board adopted the Committee’s recommendation that McCool be suspended from the practice of law for one year and one day, that she be required to attend the Louisiana State Bar Association’s Ethics School, and that she be assessed with the costs and expenses of the proceeding.¹²⁴ In response, McCool filed an objection to the Disciplinary Board’s recommendation, and the case was docketed for oral argument before the Louisiana Supreme Court,¹²⁵ which serves as the appellate court for issues concerning the Louisiana State Bar.¹²⁶

McCool argued that the First Amendment to the U.S. Constitution and Article 1, § 7 of the Louisiana Constitution guaranteed her right to free speech and that speech addressing matters of public concern, in particular, may not be restricted.¹²⁷ However, the Louisiana Supreme Court found that McCool engaged in improper ex parte communication with the two judges before whom the cases were pending because McCool promoted an online petition that targeted the judges and the cases at hand.¹²⁸ Additionally, the court concluded that McCool’s conduct was prejudicial to the administration of justice.¹²⁹ The court strongly disagreed with McCool’s First Amendment argument¹³⁰ and declared that the profession does not allow for conduct of this type.¹³¹

After determining that McCool violated the Louisiana Rules of Professional Conduct, the court considered various factors in assessing sanctions against her.¹³² The court found, among other things, that McCool intention-

121. *Id.* at 1064.

122. *Id.* at 1067.

123. *Id.*

124. *Id.*

125. *In re McCool*, 172 So. 3d at 1067.

126. *Id.* at 1068.

127. Brief of Respondent at *10, *In re McCool*, 172 So. 3d 1058 (La. 2015) (No. 13-DB-059) 2015 WL 2358383.

128. *In re McCool*, 172 So. 3d at 1073.

129. *Id.* at 1078.

130. *Id.* at 1075.

131. *Id.* at 1077.

132. *Id.* at 1078–79.

ally engaged in writing and posting the petition online.¹³³ Ultimately, the court found that McCool's online speech imposed an "intolerable disservice" to the judicial system, and although McCool contained no prior disciplinary record, the court ordered disbarment.¹³⁴

After the First Circuit Court of Appeals and the Louisiana Supreme Court denied both of McCool's writ applications regarding the stay of the adoption proceedings,¹³⁵ McCool assumed that she had temporarily exhausted her legal options in the face of continuing alleged child molestation.¹³⁶ McCool alleged that this legal stalemate led her to engage in the online speech.¹³⁷ In her sworn statement to the ODC counsel, McCool said, "I had—I had to have a sit down with myself about whether or not how involved I wanted to be in drafting the petition. But after considering it, you know, [Maurer] needed my help."¹³⁸

The Louisiana State Bar Association website offers resources for Louisiana attorneys who have questions about ethical practices.¹³⁹ McCool allegedly could have sought an opinion from the Louisiana State Bar Association if she wanted to ensure her online activity would not violate of the Louisiana Rules of Professional Conduct. However, a search of the Louisiana State Bar Association website did not return any results for "*attorney online speech*."¹⁴⁰ Even though the website does not explicitly contain an ethics opinion pertaining to online speech, McCool could have contacted the Association for an advisory opinion through a telephone call, fax, e-mail, or letter.¹⁴¹ Additionally, McCool could have sought advice from the Louisiana Disciplinary Board website which contains *Useful Links* for Louisiana attorneys.¹⁴² One link on this page directs the user to www.legalethics.com, a website that con-

133. *Id.* at 1081.

134. *In re McCool*, 172 So. 3d at 1084.

135. *Id.* at 1061.

136. *Id.* at 1080.

137. *Id.* ("[B]ecause the appeal process is a long process, in the meantime the kids are being exposed, you know, and they're not being protected . . . And even if we had been successful that would have been two and a half months where these children were being exposed to this trauma and we were just trying to do anything we could to protect them.").

138. *Id.* at 1081.

139. *Ethics Advisory Service and Opinions*, LA. STATE BAR ASS'N, <https://www.lsba.org/Members/EthicsAdvisary.aspx> (last visited Aug. 30, 2016).

140. *Id.* (search "attorney online speech").

141. *Id.*

142. *Useful Links*, LA. DISCIPLINARY BD., <https://www.ladb.org/Resources/Useful-Links/> (last visited Aug. 30, 2016).

tains blog posts pertaining to the ethics of technology uses by lawyers.¹⁴³ However, a search on this website for “attorney online speech” also did not return any results.¹⁴⁴ It remains unclear if McCool understood that her online speech would result in the harsh punishment of disbarment and if McCool could have mitigated her exposure to such risk through researching the issue before she posted comments about the cases online.

B. *The Florida Bar v. Conway*

Florida attorney Sean Conway made comments on a weblog criticizing a Fort Lauderdale judge.¹⁴⁵ The State Bar of Florida instituted disciplinary proceedings against him for allegedly violating the following two Florida Bar rules: (1) making statements that he or she “knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge”; and (2) “engaging in conduct in connection with the practice of law that is prejudicial to the administration of justice.”¹⁴⁶ After a referee issued a report recommending the Florida Bar discipline Conway, the parties resolved the case through a conditional guilty plea for consent judgment.¹⁴⁷ The Florida Supreme Court approved of the conditional plea without a written opinion.¹⁴⁸ It is difficult to deduce whether the Florida Supreme Court considered Conway’s speech in light of a *reasonable attorney* or through an alternative test because no written opinion exists.

The Florida State Bar offers the Florida Bar Practice Resource Institute to its lawyers, with a trove of resources available online.¹⁴⁹ This Institute devotes an entire section to *Office Technology*, which includes several videos pertaining to lawyers’ use of the Internet.¹⁵⁰ Additionally, the Florida Bar’s website promotes the *ethics hotline*, a resource where lawyers may obtain advice on ethical issues.¹⁵¹ However, a search of the Florida Bar Associa-

143. *Ethics of Technology Used by Legal Professionals*, LEGALETHICS.COM, <http://www.legalethics.com> (last visited Aug. 30, 2016).

144. *Id.* (search “attorney online speech”).

145. See Lucille A. Jewel, *I Can Has Lawyer? The Conflict Between the Participatory Culture of the Internet and the Legal Profession*, 33 HASTINGS COMM. & ENT. L.J. 341, 357 (2011).

146. See *id.* at 357–58 (quoting Fla. Rules of Prof’l Conduct 4-8.2(a), 4-8.4(d)).

147. See *id.* at 358.

148. Fla. Bar v. Conway, 996 So.2d 213 (Fla. 2008) (unpublished disposition).

149. *The Florida Bar Member Services PRI*, THE FLA. BAR, <http://www.floridabar.org/DIVCOM/PI/WebNodes.nsf/Nodes/9072F758DEC35924852577E000485BD2> (last visited Aug. 30, 2016).

150. *Id.*

151. *The Florida Bar Attorney Discipline*, THE FLA. BAR, <http://www.floridabar.org/tfb/TFBConsum.nsf/0a92a6dc28e76ae58525700a005d0d53/dbac6623cf5c015f85257a3f0060b781!OpenDocument#EthicsHotline> (last visited Aug. 30, 2016).

tion's website for *attorney online speech* did not return any results.¹⁵² Because it is unknown whether the Florida Supreme Court applied a *reasonable attorney* standard to Conway's case, it remains unclear if Conway's criticism of the judge really violated the relevant professional conduct rules. If his speech did not violate the rules because a *reasonable attorney* would have said the same things, then the online aspect of the speech becomes important. The Florida Supreme Court may have taken issue with the fact that Conway posted the critical speech on the Internet where it is easily accessible to the public. In that case, Conway could have turned to the Florida Bar Association for guidance before he posted the comments on the weblog.

C. *In re Disciplinary Proceedings Against Peshek*

Illinois attorney Kristine Peshek published a weblog with confidential information about her clients and derogatory statements about judges.¹⁵³ In response to the weblog, the Illinois Attorney Registration and Disciplinary Commission filed a complaint against her for allegedly violating, among other rules, Illinois Supreme Court Rule 770 which prohibited conduct "which tends to defeat the administration of justice or bring the courts or the legal profession into disrepute."¹⁵⁴ Peshek wrote on her weblog to express her thoughts regarding her work as a public defender and to help cope with the stress of a situation involving an assault upon her by a client in open court.¹⁵⁵ Although Peshek alleged that she believed she adequately concealed her clients' identities on the weblog, the Illinois Supreme Court suspended Peshek from practicing law in Illinois for sixty days.¹⁵⁶ Peshek was also licensed to practice law in Wisconsin, and in response to her sanctions in Illinois, the Wisconsin Supreme Court subsequently imposed an identical sanction.¹⁵⁷ Neither court issued an explanation for the disciplinary action, so it remains unclear if the courts sanctioned her for the critical remarks about the judges.

The website for the State Bar of Wisconsin contains an *Ethics* link, but access is restricted to Bar members.¹⁵⁸ Presumably, Peshek could have accessed the website and used the ethics resources offered. Additionally, a search of the Bar's website for *attorney online speech* returned relevant re-

152. *The Florida Bar*, THE FLA. BAR, <http://www.floridabar.org> (search "attorney online speech") (last visited Aug. 30, 2016).

153. *In re Disciplinary Proceedings Against Peshek*, 798 N.W.2d 879 (Wis. 2011).

154. *Id.* at 880.

155. *Id.*

156. *Id.*

157. *Id.* at 881.

158. *State Bar of Wisconsin for Members*, STATE BAR OF WIS., <http://www.wisbar.org/Pages/default.aspx> (last visited Aug. 30, 2016).

sults to legal ethics regarding lawyers' online speech.¹⁵⁹ Finally, Peshek could have called the State Bar of Wisconsin ethics hotline for clarification on the matter. The Illinois State Bar Association likewise offers an *Ethics* section of their website for the Bar's members.¹⁶⁰ The Association offers a list of ethics advisory opinions by subject, but none of the subjects explicitly pertain to Internet speech;¹⁶¹ a search of *attorney online speech* returned zero results.¹⁶² While Peshek may not have succeeded in researching the ethics surrounding posting her comments online, she could have at least called both states' ethics hotlines to gain guidance on the matter.

D. *In re Ogden*

Indiana attorney Paul Ogden endured a complaint filed against him by the Indiana Supreme Court Disciplinary Commission for comments he made in a private e-mail between Ogden and an opposing counsel.¹⁶³ The Commission alleged that Ogden violated Rule 8.2(a) of the Indiana *Rules of Professional Conduct* for allegedly making statements that "[a] lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge."¹⁶⁴ According to the Indiana Supreme Court's opinion, Ogden "engaged in correspondence with the . . . mother [of the decedent] and later with Judge Coleman in which he made highly critical statements about Judge Coleman."¹⁶⁵ The court held that the correct test to evaluate Ogden's statements was whether Ogden lacked any objectively reasonable basis for making the statements in consideration of the statements' nature and context.¹⁶⁶ The court concluded, because Judge Coleman was not presiding over the trial at the time that Ogden's statements referenced, that Ogden's statements were false.¹⁶⁷ Accordingly, the court held Ogden made the statements in reckless disregard of their truth or falsity because he lacked

159. *State Bar of Wisconsin*, STATE BAR OF WIS., <http://www.wisbar.org> (search "attorney online speech") (last visited Aug. 30, 2016).

160. *Practice Tools Ethics*, ILL. STATE BAR ASS'N, <http://www.isba.org/ethics> (last visited Aug. 30, 2016).

161. *Practice Tools Ethics Opinions by Subject*, ILL. STATE BAR ASS'N, <http://www.isba.org/ethics/bysubject> (last visited Aug. 30, 2016).

162. *Id.* (search "attorney online speech").

163. See Paul Ogden, *A Must Read for Indiana Attorneys: My Disciplinary Case and Its Impact on Attorney Free Speech in Indiana*, OGDEN ON POLITICS (July 25, 2013), <http://www.ogdenonpolitics.com/2013/07/a-must-read-for-indiana-attorneys-my.html>.

164. See *In re Ogden*, 10 N.E.3d 499, 500 (Ind. 2014).

165. *Id.*

166. *Id.* at 501.

167. *Id.*

any reasonable basis for the statements.¹⁶⁸ The court suspended Ogden from practicing law in Indiana for thirty days in addition to assessing him one-half of the costs and expenses of the proceeding.¹⁶⁹

Ogden claimed that he originally sent an e-mail to the opposing counsel in an estate case who replied and carbon copied the mother of the deceased and the executor of the estate on the e-mail.¹⁷⁰ Ogden then wrote back questioning Judge Coleman's behavior in the case.¹⁷¹ The mother of the deceased then sent the e-mails to Judge Coleman who subsequently wrote Ogden asking for an apology.¹⁷² Judge Coleman forwarded the e-mails to the Disciplinary Commission when Ogden refused to apologize, and the Commission filed a grievance against Ogden.¹⁷³ Ogden endured a twelve-hour disciplinary proceeding,¹⁷⁴ and he alleged that the cost of the disciplinary proceeding resulted in such an unfavorable situation that he let his bar card expire and no longer practices law.¹⁷⁵

The Indiana State Bar Association website contains a catalogue of ethics opinions; however, they are organized by year so it appears nearly impossible to find opinions relating to attorney online speech.¹⁷⁶ Additionally, a search for "*attorney online speech*" returned no relevant results.¹⁷⁷ The lack of resources in this jurisdiction is especially troubling when considering Ogden's speech occurred in a *private* e-mail.

These cases show the propensity for which state bar associations and reviewing courts have to discipline attorneys for online speech that *impugns* the judiciary in some way. Whether the speech occurs through weblogs, Twitter, online petitions, and even private e-mail, attorneys need to be aware that state bar associations can sanction speech that violates the *ABA Model Rules*. If the attorneys in the above cases researched their potential online speech before they wrote on the Internet, they likely would not have found

168. *Id.* at 501–02.

169. *Id.*

170. Ogden, *supra* note 164.

171. *Id.*

172. *Id.*

173. *Id.*

174. Dave Stafford, *Blogger Attorney Ogden Grilled in Public Discipline Hearing*, THE IND. LAWYER (July 31, 2013), <http://www.theindianalawyer.com/blogger-attorney-ogden-grilled-in-public-discipline-hearing/PARAMS/article/32049>.

175. Dave Stafford, *Ogden Quitting Law, Citing High Disciplinary Fine*, THE IND. LAWYER (Oct. 6, 2014), <http://www.theindianalawyer.com/ogden-quitting-law-citing-high-disciplinary-fine/PARAMS/article/35323>.

176. *Ethics Opinions*, IND. STATE BAR ASS'N, http://www.inbar.org/?page=legal_ethics_opinion (last visited Aug. 30, 2016).

177. *Indiana State Bar Association*, IND. STATE BAR ASS'N, <http://www.inbar.org> (search "attorney online speech") (last visited Aug. 30, 2016).

sufficient information from the state bar associations on the likelihood of disciplinary action. State bar associations should offer more robust educational resources specifically focused on the issue of Internet speech for attorneys.

IV. CRITICAL ANALYSIS OF THE LAW

A. The Private Versus Public Aspect of the Internet Barely Exists

The ability for content published on the Internet to reach millions of individuals means attorneys should consider whether the speech they make online is truly private. Law professor George A. Critchlow wrote a piece for the Washington State Bar newsletter on the Internet's magnifying effect on online statements.¹⁷⁸ Professor Critchlow wrote, "[o]urs is a multimedia culture of 'anything goes' in terms of information that pervades our lives on the Internet Information and viewpoints are now communicated instantly and are capable of being forwarded or rebroadcast to unlimited numbers of ears and eyes."¹⁷⁹ Indeed, Critchlow's admonition rings true for attorney Paul Ogden, whose e-mail ended up in the hands of the judge whom he discussed in the private communication.¹⁸⁰ While Ogden did not intend the judge to read his e-mail, the judge nevertheless saw the content and set the disciplinary process in action, which ultimately led Ogden to resign his bar card and end his practice as a lawyer.¹⁸¹ Professor Critchlow continued his commentary on the nature of Internet speech stating:

Unfortunately, much questionable information masquerades as truth to audiences that are not especially skilled at evaluating the source, authenticity, or reliability of what they hear or see. False statements, half-truths, insults, abusive comments, and degrading and insensitive exchanges now have an opportunity to accumulate and reach audiences that were unimagined in previous generations. This creates unprecedented opportunities for individuals or organizations to affect public perceptions.¹⁸²

This observation aligns with the general consensus promulgated by state bar associations and courts that attorneys should refrain from issuing inflammatory remarks about the judiciary because it may damage public perception

178. George A. Critchlow, *Attorneys' Criticism of Judges: Professional Misconduct or Protected Speech?*, WASH. STATE BAR NEWS, July 2011, Vol. 65 No. 7, at 17, http://www.wsba.org/~media/Files/News_Events/Publications/Bar%20News/2011%20Full%20Issues/201107JulyBarNews.ashx.

179. *Id.* at 22.

180. Ogden, *supra* note 164.

181. *Id.*

182. Critchlow, *supra* note 179, at 22.

of the judicial system.¹⁸³ However, it is important to remember that thirty-eight states elect their judges to state supreme courts and thirty-one states elect their judges to intermediate appellate courts.¹⁸⁴ Therefore, the option should exist for lawyers to express criticism of judges in the *marketplace of ideas*,¹⁸⁵ in order to maintain a balance between proper judicial investigations and informing the public. This argument aligns with the Meiklejohn theory, which suggests that a government run by the people necessitates unfettered speech.¹⁸⁶ After all, judges are government officials, many elected under a party in a political system, and our democratic republic places great value on keeping the government accountable by and for the people it governs. Nevertheless, state bar associations strive to promote the legal profession as a whole and so they seek to hold attorneys accountable for speech that maligns the judiciary. As such, attorneys need proper guidance on how their speech might run afoul of the various rules. In particular, attorneys need guidance on how their Internet speech might result in adverse disciplinary matters.

One method for attorneys to judge the privacy of their online speech is to look at the speech through the lens of more traditional forms of publishing like books or magazines. Frank D. LoMonte, executive editor of the Student Press Law Center, wrote, “[e]ven though forums like Facebook feel very different from books, magazines or newspapers, writing on a Facebook page is still ‘publishing.’ That means, for the most part, the same legal principles created for paper-and-ink publishing should still hold true on a smartphone screen.”¹⁸⁷ While this may seem like common-sense advice, some attorneys may not realize that various Facebook settings may lead their speech to appear more public than anticipated. Even with the highest privacy settings, a *friend* on a social media website can still take a screen shot of anything you post. This means that anyone who has access to view another individual’s social media account can take a picture of the content and preserve it for any type of future use, including sending it to otherwise unintended recipients. In the ever-changing field of social media, it is reasonable to consider that various privacy settings may not protect users to the extent that the user intends.

183. See, e.g., MODEL RULES OF PROF’L CONDUCT Preamble and Scope 5 (AM. BAR ASS’N 1983); Fla. Bar v. Ray, 797 So. 2d 556, 558–59 (Fla. 2001).

184. See *Fact Sheet on Judicial Selection Methods in the States*, AM. BAR ASS’N, http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf (last visited Aug. 30, 2016).

185. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

186. See Steven B. Lichtman, *Black Like Me: The Free Speech Jurisprudence of Clarence Thomas*, 114 PENN ST. L. REV. 415, 449 (2009).

187. Frank D. LoMonte, *When It Comes to Social Media, Some Old-School Legal Rules May Not Apply*, STUDENT PRESS LAW CTR., <http://www.splc.org/article/2014/08/when-it-comes-to-social-media-some-old-school-legal-rules-may-not-apply> (last visited Aug. 30, 2016).

Additionally, individuals simply may not understand the privacy settings for various social media platforms. It is incumbent upon those individuals to educate themselves on the privacy settings and then pay close attention to the content they publish. For example, one judge ruled that an individual who sued for violation of privacy involving disclosure of pictures from her Facebook page had waived that right when she set her Facebook settings to *open*.¹⁸⁸ Although the individual was not an attorney, this example serves as a warning to lawyers who do not have their social media accounts set on adequate privacy settings. LoMonte further analyzed:

U.S. District Judge Timothy C. Batten ruled that, because Chaney had knowingly set her Facebook privacy settings to the most “open” setting possible—allowing “friends of friends” to see everything she posted—the photo was not “private.” Chaney gave up any claim for invasion of privacy when she willingly shared the photo in a way that made it accessible to potentially thousands of people, Batten decided. Chaney’s experience is an embarrassing lesson for the rest of us: Once material is posted on a social-networking page, the law no longer will consider it “private.” It’s unclear how the judge might have ruled if Chaney had used tighter privacy settings.¹⁸⁹

Although this case involved a claim for violation of privacy and did not involve an attorney, LoMonte properly points out that even *friends-only* settings on a social media platform like Facebook may not be considered private if the user has hundreds of friends on the website.¹⁹⁰ Attorneys should be careful when using new social media platforms and educate themselves on the various privacy settings. Even then, attorneys should exercise great caution with regards to what they publish on the website.

B. Communications “Intended” as Private May Not Succeed as Such

Even an attorney’s private e-mails may be subject to discipline for the contents contained therein. When Paul Ogden sent an email criticizing a judge to the opposing counsel, the opposing counsel’s client forwarded the e-mails to the judge in question, and the judge brought a complaint against Ogden for criticizing the judiciary.¹⁹¹ Legal scholars criticized this case for the lack of First Amendment protection implicated by the discipline of speech contained in an e-mail. A reporter for *The Indiana Lawyer* asked law professor Margaret Tarkington about the First Amendment implications of Ogden’s situation. The reporter conveyed Tarkington’s comments saying:

188. *Id.*

189. *Id.*

190. *Id.*

191. Ogden, *supra* note 164.

[I]t's important that the context wasn't in a judicial proceeding where the truth-seeking function of the justice system requires a higher level of accuracy in attorney statements. "He didn't even put [the criticism] on his blog . . . An attorney should be able to talk about the judiciary in an email."¹⁹²

The complicating factor about this situation, however, is that some of the things Ogden said about Judge Coleman were false: because three different judges presided over the case at various times, Judge Coleman was not to blame for all of Ogden's allegations.¹⁹³ It is somewhat understandable that Judge Coleman would want to preserve his reputation against blatantly false accusations. Nevertheless, the tension here between critical and false statements about a judge and the relative privacy of the speech made in an e-mail highlights the potential for attorneys to suffer consequences for critical speech made on the Internet even in the most *private* forum of online communication.

C. State Bar Associations Can Better Educate Lawyers About Internet Speech

Various state bar associations and legal entities have issued guidance on social media use by lawyers. These guidelines provide insight into the pitfalls attorneys may encounter when speaking on the Internet. Additionally, these guidelines serve as useful resources for attorneys to consult when deciding whether or not to elicit the speech. For example, the Oregon Ethics Opinions suggested that public social media content is as widely viewable as magazine articles and books.¹⁹⁴ This perception could prevent many attorneys from posting speech on the Internet that might be viewed by a disciplinary committee as contrary to the ABA *Model Rules*. While it may seem like a common-sense approach, emphasizing the public nature of the Internet may make attorneys think twice before posting. Additionally, for attorneys who may be new users of social media, this outlook provides clarity in this new territory of speech.

The U.S. Department of Justice issued guidance to its employees regarding social media use, specifically noting that social media does not expand employee's speech rights.¹⁹⁵ Although not necessarily directed towards lawyers, this guidance provides practical advice that attorneys should follow

192. Dave Stafford, *Criticism of Judge Results in Discipline Case*, THE IND. LAWYER (May 22, 2013), <http://www.theindianlawyer.com/criticism-of-judge-results-in-discipline-case/PARAMS/article/31510>.

193. *Id.*

194. Christina Vassiliou Harvey et al., *10 Tips for Avoiding Ethical Lapses When Using Social Media*, BUS. LAW TODAY, http://www.americanbar.org/publications/blt/2014/01/03_harvey.html (last visited Aug. 30, 2016).

195. James M. Cole, *Memorandum: Guidance on the Personal Use of Social Media by Department Employees*, U.S. DEP'T OF JUSTICE, 2, Mar. 24, 2014, <http://>

when posting speech online.¹⁹⁶ Writing for the Department, James M. Cole wrote, “the line between public and private, personal and professional, is often blurred, especially when an employee using social media includes his or her Department affiliation or title, or comments on matters related to his or her work, or the work of the Department.”¹⁹⁷ Cole is correct to highlight the ambiguity between what is public and what is private when an individual posts on social media. If an attorney posts something on a social media platform on her own time, in her own home, and on her own computer, she may think that the speech is private and that it will not, or should not, reach a potential disciplinary committee. Further, a young lawyer with little exposure or experience with attorney disciplinary matters may not immediately think that the speech may violate a rule of professional conduct. Equally, an older attorney may not think that the speech on the social media platform, or even e-mail, has the potential to disseminate to a wide audience.

Anticipating these types of scenarios, Cole wrote for the Department, “[i]t is important to note that while vastly accelerating the speed of communication and greatly broadening the size of the audience, the advent of social media neither restricts nor expands the existing limitations on Department employee speech.”¹⁹⁸ Again, although the Department’s guidance does not apply to all attorneys, it correctly advises that social media, and the Internet in general, does not necessarily expand speech rights.¹⁹⁹ Alternatively, the Internet does not necessarily restrict speech rights.²⁰⁰ This dichotomy appears in cases of attorney discipline for speech made on the Internet, and state bar associations may need to consider alternatives to rules that may unduly burden attorneys’ free speech rights.

The Pennsylvania Bar Association brought attention to the important, and potentially underestimated, fact that clients and other individuals may discover websites that attorneys may not realize are publicly viewable. In a *Formal Opinion* posted on the Pennsylvania Bar Association’s website, the Association warned attorneys:

The Committee emphasizes that attorneys should be conscious that clients and others may discover those websites, and that information contained on those websites is likely to be subject to the Rules of Professional Conduct. Any social media activities or websites that promote, mention or otherwise bring attention to any

www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-memo-personal-use-social-media.pdf.

196. *See id.*

197. *Id.* at 5.

198. *Id.* at 6.

199. *Id.*

200. *Id.*

law firm or to an attorney in his or her role as an attorney are subject to and must comply with the Rules.²⁰¹

This warning covers almost all likely methods by which an attorney may publish speech online and warns that the speech may reach the eyes of an unintended audience. However, this warning does not suggest that speech in private e-mails may also be subject to the rules of professional responsibility.²⁰² While it remains unclear if there might have been an alternative outcome had Ogden's case occurred in Pennsylvania as opposed to Indiana, an attorney in Pennsylvania would not be on notice from this warning that speech made in an e-mail might be subject to discipline. Consequently, the Pennsylvania State Bar Association should amend their guidance to alert attorneys as to whether or not speech in e-mails is open to disciplinary attack.

The New York State Bar Association also issued a warning to its attorneys regarding online speech. Specifically, the Association warned of the inability for Facebook users to know who has viewed their profile.²⁰³ This warning is significant because an attorney may think he or she has put his or her profile on appropriate privacy settings, but if the attorney did not fully protect the account then an individual could see the content and the attorney would not know.

The Association gave two examples in which attorneys' speech made on the Internet resulted in disciplinary action.²⁰⁴ Robert Heverly wrote on behalf of the Association, "in the first case, an attorney handling a wrongful death case sent a picture of the dead body to a friend and included disparaging remarks. As the firm monitored e-mail, his firm saw the message and reported him to the disciplinary authorities."²⁰⁵ Thus, lawyers in New York possess sound guidance as to the potential for disciplinary action stemming from speech made not only on the Internet but also in seemingly private forms of communication like e-mail. Additionally, this lack of information may extend to other social media platforms. For attorneys who wish to post information on a social media platform, they should be aware of both the privacy settings and the general function of the platform. Heverly pointed out, "fully understanding how a particular technology platform works is critical to the situation. Despite repeated appearances of claims to the contrary on

201. *Ethical Obligations for Attorneys Using Social Media: Formal Opinion 2014-300*, PA. BAR ASS'N 2, <https://www.pabar.org/members/catalogs/Ethics%20Opinions/formal/F2014-300.pdf> (last visited Aug. 30, 2016).

202. *See id.*

203. Robert Heverly, *The Law and Ethics of Social Networking & Online Activity*, NY STATE BAR ASS'N 20, <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=44239> (last visited Aug. 30, 2016).

204. *Id.* at 7.

205. *Id.*

Facebook, Facebook users are not aware when someone has viewed their public profile pages.”²⁰⁶

While the above examples show that adequate information about speaking on the Internet can be disseminated to individuals and attorneys, this does not provide sufficient education to attorneys as a whole. For the attorneys sanctioned for their online speech, the individual searches of the state bar associations’ websites did not produce robust resources to determine the ethical implications of Internet speech. Embedded in this issue of attorney online speech is the potential clash of the ABA *Model Rules* and the First Amendment. Attorneys may think they can simply speak their minds about the judiciary without fear of retribution; however, state bar associations can, and do, punish lawyers for *impugning* the judiciary. Therefore, state bar associations may have to work with their members to construct more speech-friendly policies. The associations strive to protect the integrity of the profession and the judiciary through policing attorney speech—both offline and online. As such, the state bar associations should offer more information to attorneys about the ramifications of speaking on the Internet.

V. CONCLUSION

Attorneys spend their careers speaking, and so they must pay close attention to the rules that govern what they can and cannot say. The ABA *Model Rules* serve as the baseline for understanding the restraints on attorney speech—whether that speech relates to clients, work, or judges. Attorney speech about judges, however, deserves special consideration because of the First Amendment implications inherent in rules that constrain or bar speech that *impugns* the judiciary. While one argument in favor of regulating that type of speech is to protect the public’s confidence and view of the judiciary, an argument against regulation is that the public deserves to hear about judicial impropriety. Although attorneys may air their grievances against judges through the formal process of filing a complaint, this should not be the only forum in which attorneys can express frustration or despair about the judiciary. Elected judges in particular should be held accountable by the people they govern. As it stands, however, lawyers must submit to the rules that govern their profession and so they must remain vigilant about the words they speak and write.

In light of the constraints surrounding attorney speech directed at or relating to the judiciary, reviewing courts have developed two main methods to review state disciplinary committees’ decisions on attorney disciplinary matters. Many courts apply the *reasonable attorney* standard to deduce whether a *reasonable attorney* would say the same things as the attorney under investigation. This standard contains few parameters and ultimately emerges as undefined and perilously malleable in the hands of the court. After all, courts must decide if a *reasonable attorney* would say *impugning*

206. *Id.* at 20.

remarks about the judiciary. The lack of objective removal in that type of situation might lead to courts punishing lawyers out of sheer anger for certain remarks—regardless of whether or not a *reasonable attorney* would or would not say those things. Other courts, however, apply the more flexible *Sullivan* standard, which focuses on the truth or falsity of the speech in question.²⁰⁷ This approach allows courts to inquire as to whether or not the attorney purposefully spread false information about the judiciary. Under this standard, attorneys can still say critical remarks about the judiciary and not fear the wrath of an offended court. The differences between the two standards appear to result in differing degrees of punishment for attorneys—with the *reasonable attorney* standard resulting in harsher punishments than the *Sullivan* standard. However, courts remain divided on the choice between the two standards, and attorneys need to research their jurisdiction to learn the standard to which courts will hold them.

Analyzing this restraint on attorney speech as applied to the very popular form of speech today—the Internet—results in the emergence of unique cases in which attorneys speak in public and private fashions and suffer disciplinary consequences for that speech. Attorneys who speak on social media websites should not expect any privacy protections for their speech. Even though such websites may contain privacy features, attorneys should know that often those privacy features do not work correctly, attorneys may not understand the features fully, or individuals may access the content through other means. This type of approach to Internet speech may be intuitive for some and wholly unknown and foreign to others. As such, state bar associations owe attorneys proper guidance on both the perils and benefits of Internet speech. A brief review of state bar associations' websites, where lawyers should find useful information, results in very little or no useful information regarding Internet speech.

Additionally, some attorneys endure punishment for speech made through more private Internet means such as e-mail. This level of intrusion into e-mail contents represents a disturbing show of power by the disciplinary committees and reviewing courts. On its face, this type of regulation seems overbearing and unwarranted. Lawyers must possess the right to gripe about others, including judges, in confidence. While state bar associations will likely not prosecute a lawyer for simple griping, the fact remains that they possess the power to bring disciplinary charges against attorneys for *impugning* the judiciary. It is unclear where the state bar associations draw the line between *griping* and *impugning*; however, for an attorney in a *reasonable attorney* jurisdiction, that line may be closer to griping than one might expect.

Attorneys owe respect to their profession and the judiciary before whom they practice. They also possess, however, the right to speak about the judiciary in a candid and forthright manner. While state bar associations, disciplinary committees, and reviewing courts attempt to keep lawyers' speech in

207. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

line to protect the public's confidence in the judicial system and to protect judges from unwarranted attacks, these associations could do more to educate lawyers on the potential consequences of making Internet comments about the judiciary. Preparing and making available easy-to-access information on their websites about the ethical issues surrounding online speech would give attorneys notice about both the type of standard applied in their jurisdiction to disciplinary cases and the permissible limits of communicating information on the Internet.

Now that you understand the nuances of speaking ill about the judiciary, would you send that letter airing your frustrations about the judge over the Internet? If you are a *reasonable attorney*, perhaps you should think twice.

